AGESON ENTERPRISE SDN BHD
(FORMERLY KNOWN AS ESA PILE SDN BHD)
v. LKD TRADING SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN JC
[POST WINDING-UP NO: WA-28PW-158-05-2021]
22 NOVEMBER 2021

Abstract – *An ex parte injunction could not be extended beyond 21 days. The execution of an Anton Piller order, after its expiry, is illegal and an invalid execution, apart from being an abuse of court process. Such non-compliance could not be corrected by subsequent compliance.*

CIVIL PROCEDURE: *Judgments and orders – Anton Piller order – Expiry – Anton Piller order obtained to gain access to premise – Anton Piller order executed after expiry – Whether execution legal and valid – Whether principles of law governing Anton Piller injunction satisfied – Whether there was abuse of court process – Whether occasioned miscarriage of justice – Whether Anton Piller order ought to be complied with – Rules of Court 2012, O. 29 r. 1(2B)*

The respondent was a wound up company. Following allegations of fraud committed or concealment of material facts in relations to the respondent, PW68 was commenced and an *ex parte Anton Piller* order ('APO') was obtained against the applicant. The APO, obtained for the purpose of gaining access to a warehouse ('premise'), was subsequently executed. It was the company's contention that upon the granting of the APO and the sealing of the premise, they ought to seek a subsequent *Anton Piller* order, which led to the filing of PW128. In PW128, the respondent commenced a similar action seeking for an APO against the applicant and another entity, Ageson Land Sdn Bhd. In the present motion, the applicant sought, pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('ROC') and the inherent jurisdiction of the court, *inter alia*, the following orders: (i) that the notices of application, dated 1 March 2021 and 3 May 2021 respectively filed at the High Court, be struck out and/or dismissed without liberty to file afresh; (ii) the costs be borne by the joint liquidators of the respondent personally, whether jointly and/or severally on an indemnity basis; and (iii) exemplary damages to be assessed against the respondent or, in the alternative, against the joint liquidators of the respondent personally. In support of its application, the applicant submitted that (i) in seeking the APO, the respondent failed to satisfy the principles of law governing an *Anton Piller* injunction; and (ii) the evidence, taken in totality, showed that the respondent had abused the court process and caused miscarriage of justice.

Held (allowing motion in part):

(1) Order 29 r. 1(2B) of the ROC and the authorities mentioned that an *ex parte* injunction could not be extended beyond 21 days. The APO was obtained on 16 March 2021 and would thus lapse on 7 April 2021 *ie*, 21 days after the APO was obtained. The execution of the APO was done on 8 April 2021, a day after the expiry of the APO. The respondent did not inform the applicant that the APO had expired but continued to execute the same. This was an illegal and invalid execution of the APO and an abuse of court process. The applicant was not required to comply with the APO. (paras 20 & 21)

(2) The APO could not exist on its own as a cause of action and there should be a substantive cause of action against the applicant where the APO was sought pending the determination of the final relief sought. The granting of the APO on 16 March 2021 was wrong as there was no pre-existing cause of action with a final relief claimed against the applicant shown in PW68 and PW128. Furthermore, no particulars of fraud existed in PW68 and such requirement was a necessary requirement in a fraud claim. Therefore, PW68 was unsustainable in the absence of the substantive relief which ought to be sought. The respondent should have pursued a separate cause of action against the applicant and obtained relief in the said separate proceedings. (paras 22, 23 & 24)

(3) The APO was too broadly framed, imprecise and oppressive. It was not carried out strictly on its terms and the undertakings under it, where such strict approach was absolutely necessary in such circumstances. Based on the safeguards and undertakings required for an APO and the draconian effect of an APO, there had been non-compliance of the APO; such non-compliance could not be corrected by subsequent compliance. (paras 37 & 38)

(4) The factual matrix and the prayers/reliefs sought in PW68 and PW128 were similar. Based on the finding in respect of PW68, PW128 amounted to a fishing expedition and an abuse of court process. PW128 was also unsustainable in the absence of substantive relief which ought to be sought for against the respondent, *ie*, the applicant and Ageson Land Sdn Bhd. (paras 41 & 42)

Case(s) referred to:

Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Cheah Cheng Lan v. Heng Yea Lee & Ors [2001] 1 CLJ 727 CA ***(refd)***
Dr Milton Lum Siew Wah v. Majlis Perubatan Malaysia [2020] 1 CLJ 270 HC ***(refd)***
N-Visio Sdn Bhd v. Horizon Multimedia Sdn Bhd & Ors [2010] 3 CLJ 585 HC ***(refd)***
Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***
Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd [2008] 6 CLJ 149 CA ***(refd)***

Pentamaster Instrumentation Sdn Bhd v. QAV Technologies Sdn Bhd & Ors [2017] 5 CLJ 736 HC ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***
See Hua Daily News Bhd v. Tan Thien Chin & Ors [1985] 1 LNS 131 SC ***(refd)***
Sigma Glove Industries Sdn Bhd & Ors v. Ong Chin Kok & Anor [2018] 3 CLJ 405 HC ***(refd)***
Siskina (Cargo Owners) v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***
Universal Thermosensors Ltd v. Hibben and Others [1992] 3 All ER 257 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***

Legislation referred to:
Companies Act 2016, s. 503
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 29 r. 1(2B)
Whistleblower Protection Act 2010, s. 2

For the applicant - Mohd Izzul Faris Mohd Ghani & Sandra Tan Xue Qi; M/s Syed Ibrahim & Co
For the respondent - Sachpreetraj Singh Sohanpal & Arun Ganesh Boopalan; M/s Raj & Sach

Reported by Najib Tamby

JUDGMENT

(encl. 1)

Nadzarin Wok Nordin JC:

[1] In the notice of motion dated 19 May 2021 in encl. 1 (motion), the applicant has applied pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and the inherent jurisdiction of this court for *inter alia* the following orders:

(i) that the notice of application dated 1 March 2021 filed *vide* Kuala Lumpur High Court Winding Up No. WA-28PW-68-03-2021 be struck out and/or dismissed without liberty to file afresh;

(ii) that the notice of application dated 3 May 2021 filed *vide* Kuala Lumpur High Court Winding Up No. WA-28PW-128-03-2021 be struck out and/or dismissed without liberty to file afresh;

(iii) the costs be borne by the joint liquidators of the respondent company ("company") Dato' Ler Leng Chye and Lum Tuck Cheong ("joint liquidators") personally whether jointly and/or severally on an indemnity basis;

(iv) interest of 5% on the costs awarded;

(v) exemplary damages to be assessed against the respondent; and

(vi) in the alternative, exemplary damages against the joint liquidators of the company personally.

[2] The grounds in support of the motion are amongst others:

(i) the *Anton Piller* order was obtained *ex parte* against the applicant on 16 March 2021 and was executed on 8 April 2021 which is more than 21 days after which is expressly against O. 29 r. 1(2B) of the Rules of Court 2012;

(ii) the *Anton Piller* order cannot exist on its own as a cause of action;

(iii) the company had failed to comply with the strict requirements under O. 29 of the Rules of Court 2012; and

(iv) the threshold for an *Anton Piller* order had not been met.

Background Facts

[3] The company, LKD Trading Sdn Bhd is a company which was wound up on 24 September 2020. Pursuant to the winding up, Ler Chen Chye and Lum Tuk Cheong were appointed as joint liquidators by the court.

[4] There was a report prepared by the joint liquidators pursuant to s. 503 of the Companies Act 2016 and it is the liquidators' view that there was purported fraud committed or material facts have been concealed in relations to the company.

[5] Premised on the same, the joint liquidators have caused the company to commence PW68 and obtained an *ex parte Anton Piller* order ("APO") against Ageson Enterprise on 16 March 2021.

[6] The APO was obtained for the purpose of gaining access to a warehouse located at No. D-00-10, Pangsapuri Mawar Jaya, Jalan KP 4/5, Kota Perdana, Bandar Putra Permai, 43300 Seri Kembangan, Selangor Darul Ehsan ("premise").

[7] On 8 April 2021, the APO was executed at the registered address of Ageson Enterprise at No. 17-03, Q Sentral, 2A, Jalan Sentral 2, KL Sentral, 50470 Kuala Lumpur.

[8] It is the company's contention that upon the granting of the APO and sealing of the premise, they ought to seek for a subsequent *Anton Piller* order from this court which led to the filing of PW128.

[9] In PW128, the company had commenced a similar action seeking for an *Anton Piller* against Ageson Enterprise and another entity named Ageson Land Sdn Bhd.

Applicant's Submissions

[10] The applicant had submitted that in seeking the *Anton Piller* order, the company had failed to satisfy the principles of law governing an injunction and specifically an *Anton Piller* injunction and the evidence taken in totality will show that the company had abused this court's process and have caused a miscarriage of justice.

[11] It is further submitted by the applicant that:

(i) as an officer of the court, the company's solicitors have a duty to bring to the attention of this court the strict requirements of an *ex parte* injunction and the need to serve the same within seven days and for a return date to be given within 14 days;

(ii) despite the *Anton Piller* order having expired, the company's solicitors did not inform the applicant the status of the same but continued to execute the same;

(iii) there was therefore no effective *Anton Piller* order at the time of executing the same;

(iv) the conduct of the company is illegal and an abuse of court process as well as act in contempt of court having utilised a court order which has expired for the purpose of executing an injunction;

(v) there is no evidence that the applicant was a tenant or having any form of possession to the premise or the documents of the company;

(vi) even if this court concludes that the *Anton Piller* order ought not to be granted, damages ought to be given to the applicant;

(vii) the refiling of PW128 is a fishing expedition and an abuse of court process;

(viii) the company's solicitors had conceded during the hearing on 7 October 2021 that there is no pleaded cause of action;

(ix) the reliance on the Whistleblower Protection Act 2010 that the alleged disclosure by an alleged reliable source on the details of the premises or that the records were moved to the same does not fall under the said Act and thus any submissions on this point are misconstrued and misplaced; and

(x) the above had caused substantial miscarriage of justice to the applicant.

Company's Submissions

[12] The company had raised a preliminary objection on the motion stating that:

(i) the same was procedurally and legally wrong on the ground that the prayers therein for PW68 to be struck off had been disposed of by this court and thus the filing of the motion was procedurally wrong in its entirety;

(ii) it was further submitted that the court was *functus officio* in this matter;

(iii) the applicant should have applied to set aside the *Anton Piller* order but had failed to do so; and

(iv) PW128 had yet to be heard and is still an active suit and the applicant should have filed the motion under PW128.

[13] The company had thereafter submitted *inter alia* that:

(i) The respondent company submits that both of its directors, Mr Abdul Jalal bin Kasnan and Mr Muhammad Nasron bin Kasnan were summoned and had testified before this Honourable Court on 24 September 2020 wherein they had denied their appointment and their involvement in the affairs of the applicant company once again. However, the directors have maintained that they have no personal knowledge and as such had no useful information or documents to provide.

(ii) Subsequently, the respondent company had filed the Kuala Lumpur Post Winding-Up Application No. WA-28PW-68-03-2021 ("PW68") before the court to obtain an *ex parte Anton Piller* order in order to access the premise to search, check, inspect, make copies and/or seize any of the respondent company's documents, accounting ledgers, invoices, price quotation, emails, letters, orders, acknowledgement of receipt, receipts, list of customers and/or any other form of record of the company (herein), the applicant and Ageson Land Sdn Bhd which had been stored at the said premise (referred collectively as "the said records").

(iii) The company had submitted to the learned High Court Judge on the factual matrix as well as the requirement that need to be satisfied in order to obtain an *ex parte Anton Piller* order ("*ex parte* order"). It was further explained to the court that the relationship between the applicant and Ageson Land Sdn Bhd shows that these companies function as a single economic unit under the same parent company, Ageson Bhd. These companies are in fact one and the same and share the same controlling mind. The court judge had thereafter granted the *ex parte* order to the company.

(iv) The company's solicitors, Bailiff of the Kuala Lumpur High Court, and the supervising solicitor, one Ms Lily Yii Ling Choo ("search party"), had on 8 April 2021 attempted to execute the *ex parte* order by effecting service on the applicant's registered and business address.

(v) The following events transpired on 8 April 2021:

(a) The company at this juncture submits that the chronology of events as portrayed by the applicant is completely false and is a dishonest attempt to paint the company as well as its solicitors in bad light.

(b) The applicant has falsely stated that the applicants' solicitor, one Mr Sachpreetraj Singh Sohanpal had behaved aggressively in trying to gain access to the first respondent company's registered and/or business address.

(c) The company submits that at all times, the company's solicitors made it abundantly clear that their presence at the applicant's registered and business address was only to serve the *ex parte* order and subsequent to the said service, to proceed to search the said premise. This was clearly explained to the applicant's staff during the company's solicitor's initial attempt to effect service outside of the applicant's registered and business address and when the company's solicitor, the Bailiff, the supervisory solicitor and one Mr Lim Tien Loong were finally allowed entry to serve the *ex parte* order after approximately two hours.

(d) The terms of the order were made abundantly clear to one Ms Katwuimin by the company's solicitors. The said Ms Katwuimin then acknowledged receipt of the *ex parte* order and proceeded to consult with the applicant's solicitors for approximately three hours before meeting with the company's solicitors, the Bailiff and the supervisory solicitor.

(vi) the company emphasise that the company had sufficiently presented to the court during the hearing for the *ex parte* order on the nature of the relationship between the applicant, the Ageson Land Sdn Bhd and the said premise. The court, upon deliberating the evidence before it saw it fit to grant the respondent company the *ex parte* order.

(vii) the applicant and the company were sister companies that share the same parent company, Prinsiptek (M) Sdn Bhd ("Prinsiptek"). Both the company and Prinsiptek are currently in liquidation and for both companies the respective liquidators have come to the conclusion that fraud had been perpetrated within them.

(viii) The *modus operandi* is almost identical whereby the identities of the same individual were used without their knowledge and consent to be appointed as directors and to be allotted as shareholders ("the said individual").

(ix) The applicant does not possess any valid reason to retain the said records and/or handle them. The actions of the applicant in moving and/or causing to be moved the said records which do not belong to it is an action calculated to suppress and interfere with the evidence contained within the said records.

(x) The joint liquidators would be unable to carry out their duties effectively for the full benefit of the creditors and this will prejudice and cause undue losses to the creditors of the company who are innocent third parties.

(xi) There is no breach of natural justice as alleged.

(xii) At the point of execution of the *Anton Piller* order, the applicant is required to comply with the said *Anton Piller* order and that the company's duty was only to serve the sealed *Anton Piller* order and to inform the applicant of the exact terms of the applicant is required to comply with the said *Anton Piller* order which the applicant retained the discretion to refuse.

(xiii) The terms of the *Anton Piller* order were explained word by word to the applicant's representative and that the applicant had the right to consult its solicitors first.

(xiv) The service of the *Anton Piller* order was pursuant to an order of court.

(xv) The applicant had informed the company's solicitors, after being served with the *Anton Piller* order, that they had no knowledge of the premise and was not in control of the same and refused to allow access to the said premise.

(xvi) Subsequently, the company had sought clarification from the court and was informed to file a further application for an *inter partes Anton Piller* order which was done *via* PW128.

(xvii) In reply to the applicant's, the company states that the Practice Direction No. 1 of 2018 provides that all cases post winding-up are to use the 28PW Code.

(xviii) PW68 and 128 are applications for *Anton Piller* orders and so long as they manage to satisfy the pre-conditions for the issuance of an *Anton Piller* order, then PW68 and PW128 ought not to be struck out.

(xix) There is clear and incontrovertible evidence that the company had fulfilled the requirements for the *Anton Piller* application.

(xx) This is not a clear case of either PW68 and/or PW128 being plain and obviously unsustainable.

(xxi) The mere fact that PW68 and/or PW128 are weak or that it would appear to be unlikely to succeed at the hearing would not be a ground for PW68 and PW128 to be struck out.

(xxii) The company deserves the right not to be shut out from the judicial process.

(xxiii) There is likelihood of fraudulent activities being committed.

(xxiv) Material facts have been concealed by officers of the company.

(xxv) The officers of the company have been guilty of impropriety or recklessness in relation to the affairs of the company.

(xxvi) The joint liquidators would be unable to carry out their duties effectively for the full benefit of the creditors which will cause prejudice and undue losses to the creditors of the company.

(xxvii) The said records are within the possession of the company and there is a real risk they may be destroyed.

(xxviii) The respondent company through a reliable source has located the said records, which are at a storage locked away from the applicant's place of business. The company is also aware that the applicant had planned to relocate the said records to another location in March 2021. However, as the premise has been sealed pursuant to the *ex parte* order, this was prevented from happening.

(xxix) However, since the tenancy for the said premise with control focus engineering has expired and the applicant has failed to prove whether any attempts were made to renew the tenancy, the company submits that if this application is not allowed, the applicant will definitely move the said records out of the said premise.

(xxx) The company submits that this application is warranted in order to protect any evidence that may be found in the said records of the fraud and to prevent such evidence from being destroyed and to aid the court in coming to a just and fair decision for the benefit of the creditors of the company. There is a very real and apparent risk that the applicant will relocate the said records should this application be dismissed.

(xxxi) The applicant had failed to adduce any evidence or make any averments to dispute that the said records are not being kept in the premise.

(xxxii) The company is willing to give an undertaking as to damages for any damages or losses caused to the applicant and there is a high chance that the applicant would suffer minimal losses given the fact that the said premise is separate from the applicant's place of business.

(xxxiii) The applicant had failed to disclose that the deponent of the applicant is also a director of Ageson Land Sdn Bhd and thus contrary to the applicant's claim that they and the latter company were separate and distinct legal entities.

(xxxiv) There were various contradictions made by the applicant and Ageson Land Sdn Bhd in PW128.

(xxxv) PW128 should be heard afresh with the company being given an opportunity to explain and submit on the same.

(xxxvi) The prayers sought in both PW68 and PW128 are sufficiently clear and that the company cannot be faulted if the list of documents sought are extensive as they are all sought for with regards the monetary transactions of the applicant, the company and Ageson Land Sdn Bhd.

(xxxvii) There is clear difference between a fishing expedition and a mere need for a vast selection of documents.

Findings Of The Court

Preliminary Objection

[14] The court had earlier on 9 September 2021 dealt with the applicant's PO and dismissed the same after hearing the respective parties' counsels submitting on the same on the ground that the applicant was not seeking to set aside the *Anton Piller* obtained but to strike it out as it had elapsed.

Principles For Striking Out

[15] The applicant's motion for striking out is premised on both O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and the inherent jurisdiction of this court.

[16] In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 the Supreme Court had held that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* 7, and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly* Co 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* 9). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of

the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* 7). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. A

Expiry Of Anton Piller Order

[17] Under O. 29 r. 1(2B) of the Rules of Court 2012 it is provided that: B

> Unless earlier revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse twenty-one days from the date it was granted.

[18] The Court of Appeal in *Cheah Cheng Lan v. Heng Yea Lee & Ors* [2001] 1 CLJ 727; [2001] 1 MLJ 433 had held that: C

> The court has no power to extend the life of an *ex parte* injunction beyond 21 days because of the words 'shall automatically lapse' (see p 1353, *Malaysian High Court Practice:* 1998 (Desk Ed) 1 MLJ).

[19] The above decision was accepted and reaffirmed by a different Court of Appeal quorum in *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83; [2002] 3 MLJ 1 and I am bound by this decision by virtue of the doctrine of *stare decisis.* For the sake of completeness, I had in coming to my decision herein also considered *N-Visio Sdn Bhd v. Horizon Multimedia Sdn Bhd & Ors* [2010] 3 CLJ 585; [2009] MLJU 1249 which was referred to this court by the counsel for the company which I respectfully decline to agree with and hold that *Cheah Cheng Lan* (*supra*) and *RIH Services (M) Sdn Bhd* (*supra*) is binding on this court. D E

[20] It is therefore clear to this court on the aforesaid O. 29 r. 1(2B) of the Rules of Court 2012 and the authorities mentioned that an *ex parte* injunction cannot be extended beyond the 21 days. In counting the number of days elapsed, this court had, as held in *RIH Services (M) Sdn Bhd* (*supra*), counted the number of days beginning from the day after the *Anton Piller* was obtained and in the matter before me the *Anton Piller* order was obtained on 16 March 2021 would thus lapse on 7 April 2021 ie, 21 days after the said *Anton Piller* order obtained. The *Anton Piller* order would thus automatically expire on the said date. F G

[21] From the facts before this court, the execution of the *Anton Piller* order was done on 8 April 2021, which was therefore a day after the expiry of the said *Anton Piller* order obtained and I find that the company's solicitors did not inform the applicant that the said *Anton Piller* order had expired but continued to execute the same, which I hold is therefore an illegal and invalid execution of the said order on the applicant, apart from being an abuse of court process. In the circumstances, the applicant is not required to comply with the said *Anton Piller* order for the reasons aforesaid. H I

Independent Cause Of Action

[22] I agree with the applicants that the *Anton Piller* order cannot exist on its own as a cause of action and there should be a substantive cause of action against the applicant where the *Anton Piller* order is sought pending the determination of the final relief sought therein and which authority can be found in *Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd* [2008] 6 CLJ 149; [2009] 2 MLJ 404 wherein the Court of Appeal adopted with approval the approach taken by Lord Diplock in *Siskina (Cargo Owners) v. Distos Compania Naviera SA* [1979] AC 210 and held:

> [3] In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained. We consider it unnecessary to do more than refer to the following passage in the speech of Lord Diplock in the *Siskina (Cargo Owners) v. Distos Compania Naviera SA* [1979] AC 210 at p 256:
>
> > … a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

[23] After considering the respective submissions before me including the respective case laws provided by both counsels, I therefore hold that this court was therefore wrong in granting the *Anton Piller* obtained on 16 March 2021 as there was no pre-existing cause of action with a final relief claimed against the applicant herein shown in PW68 as well as PW128. I further agree with the applicant's counsel that no particulars of fraud existed in PW68 had existed and that such a requirement was a necessary requirement in a fraud claim, see cases such as *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1985] 1 LNS 131; [1986] 2 MLJ 107; *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738; [1996] 1 MLJ 62; and *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703; [2009] 2 MLJ 672.

[24] Thus, I hold that PW68 is unsustainable in the absence of the substantive relief which ought to be sought for, and that the company should have pursued a separate cause of action against the applicant and obtained relief thereto in the said separate proceedings.

Whistleblower Protection Act 2010

[25] I also now hold that the reliance on the Whistleblower Protection Act 2010 ("Act") that the alleged disclosure on the details of the premises by the 'reliable source' and that the records were moved to the said premises to the joint liquidators do not fall under the said Act and thus any submissions on this point should not have been tendered to this court under the guise of the said Act as the joint liquidators are not to be considered under the definition of an 'enforcement agency' under the said Act.

[26] The relevant sections in the Whistleblower Protection Act 2010 provides:

Section 6

(1) A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct:

Provided that such disclosure is not specifically prohibited by any written law.

Section 2

In this act, unless the context otherwise requires:

"enforcement agency" means:

(a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division, department or agency of such ministry, department, agency or body, conferred with investigation and enforcement functions by any written law or having investigation and enforcement powers;

(b) a body established by a Federal law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or

(c) a unit, section, division, department or agency of a body established by a Federal law or State law having investigation and enforcement functions;

[27] A case on point for the above sections can be seen in *Dr Milton Lum Siew Wah v. Majlis Perubatan Malaysia* [2020] 1 CLJ 270 where the court held *inter alia* that reference to the Act showed that the respondent therein was not an enforcement agency, as defined under s. 2 of the Act, where reference was made to Parliamentary debate on the Bill, which showed that the Bar Council, a disciplinary authority for lawyers, is not an enforcement agency, as defined under s. 2 of the Act. As such, the respondent, a disciplinary authority for medical practitioners, which has the functions and duties similar to the Bar Council, was also not an enforcement agency under the Act.

[28] It was therefore plainly wrong for the company's solicitors herein to have sought for protection under the said Act with regards the identity of the said reliable source and that they were misconstrued and misplaced in having submitted on this to this court on the same.

Order 29 Rules Of Court 2012 Requirements

[29] Order 29 of the Rules of Court 2012 states that:

(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's originating process, counterclaim or third party notice, as the case may be.

(2) Such application may be made by a notice of application supported by an affidavit and where the case is one of urgency, may be made *ex parte*.

(2A) The affidavit in support of an application made *ex parte* must contain a clear and concise statement of:

(a) the facts giving rise to the claim;

(b) the facts giving rise to the application for interim injunction;

(c) the facts relied on to justify the application *ex parte*, including details of any notice given to the other party or, if notice has not been given, the reason for not giving notice;

(d) any answer by the other party (or which he is likely to assert) to the claim or application;

(e) any facts which may lead the court not to grant the application *ex parte* or at all;

(f) any similar application made to another Judge, and the order made on that application; and

(g) the precise relief sought.

(2B) Unless earlier revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse twenty-one days from the date it was granted.

(2BA) An *ex parte* interim injunction must be served within seven days of the date of the order, and the court when granting the order must fix a date to hear the application *inter partes* within fourteen days from the date of the order.

(2C) A court shall not grant an injunction on an *ex parte* application if the effect is to stop the holding or progress of a meeting of a body corporate, a society, an association, a union, an organization, a club or any other body of persons however constituted or named.

(3) The plaintiff may not make such an application before the issue of the originating process except where the case is one of urgency, and in that case:

(a) the injunction applied for may be granted on such terms, if any, as the court thinks fit; and

(b) if the originating process is not issued within two days of the granting of the injunction, or such other period as the court thinks fit, the court shall, on application by a defendant, discharge the injunction.

(4) An order for interim injunction shall be in Form 53.

[30] From the minutes in PW68, this court has observed that the company's solicitors had regrettably failed to bring to the attention of this court the strict requirements of an *ex parte* injunction and the need to serve the same within seven days and for a return date to be given within 14 days. Without casting any aspersions on the said company's solicitors, the same should have been done and the court alerted and/or reminded of the need of the return date to be fixed, when the court had mistakenly made an oversight in failing to provide a return date for the matter.

[31] I now agree upon evaluation of the entire evidence provided to me that the evidence that the applicant was a tenant or having any form of possession to the premise or the documents of the company was not shown on an extremely strong *prima facie* to this court more so when Ageson Land Sdn Bhd was only now included as a party in the PW128 matter.

[32] This court further finds that the *Anton Piller* order did, upon closer scrutiny, allowed access not to just the company's documents but documents related to the applicant and/or related to the applicant and thus the company and/or its solicitors had not acted properly in seeking for this part of the *Anton Piller* order.

[33] However, I do not find that the company and/or its solicitors had acted *mala fide* in this respect based on the entire set of facts before this court where there were allegations by the company of *inter alia* likelihood of fraudulent activities being committed, material facts having been concealed by officers of the company and the officers of the company having been guilty of impropriety or recklessness in relation to the affairs of the company. I am thus of the considered view that their actions were more on the basis of being improperly appraised of the law, which at its highest would be a hasty, rash and/or negligent act in seeking such an order.

[34] In *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889; [2005] 6 MLJ 239, the Court of Appeal had laid down the necessary safeguards and undertakings required for an *Anton Piller* order which are as follows:

... we are entirely in agreement with the observation of the learned judge in the case of *Makonka Electronic Sdn Bhd v. Electrical Industry Workers' Union & Ors* when he said:

> It is a draconian order, granted by the court upon the balance of undertakings by the applicant and upon specific terms and conditions. Those terms, conditions and undertakings cannot be ignored or left for subsequent compliance at will. Compliance with the terms of the conditions and undertakings are necessary pre-conditions to the enforcement of the order … The *Anton Piller* order is a valuable procedure and ought to be preserved. The efficacy, however, of the *Anton Piller* procedure depends very much on all the parties seeking a fine balance to protect their respective interests and rights. A solicitor acting for an applicant must remember at all times that he is an officer of the court, and to ensure that the application he is putting forward contains adequate safeguards of the basic rights of the other party. It is not that he is obliged to act for the other party, but that he is bound to ensure the procedure is not abused. He must put forward a reasonable application if it is to be entertained. He should for example ensure:
>
> 1 That there is full and frank disclosure of all relevant information and evidence to justify the issue of the order.
>
> 2 The order must be drawn such that it extends no further than the minimum necessary to achieve the preservation of evidence which may be otherwise removed or destroyed.
>
> 3 The application includes first alternative prayers for orders to produce and deliver specific evidence. Only upon the respondents' failure to produce and deliver such evidence would the other orders of the *Anton Piller* order are to come into effect. This would offer a 'less draconian unless necessary' approach, and by specifying the evidence to be produced avoid fishing expeditions and unnecessary invasion into unrelated information.
>
> 4 That the application contains clear and specific undertakings that the order will be served by a solicitor who will at the same time supply a copy of the application and all affidavits and documents put before the judge in making the application; explain its exact terms to the respondent; advise him to seek immediate legal advice and that he has a reasonable time to do so.
>
> 5 That the application contains clear undertakings for damages, and that the evidence obtained will not be used in any other proceedings without the consent of the court.
>
> 6 As a further safeguard, to have a separate solicitor to supervise the execution by the applicants' solicitors, and persons who are to accompany him are to be named in the order so that they may be identified by the respondent (see *Vapormatic Co Ltd v. Sparex Ltd* [1976] 1 WLR 939).

> The purpose of the safeguards is to ensure that the enforcement of the order could be carried out in a peaceful and orderly manner. For that purpose the order must be carried out strictly on its terms and the undertakings thereunder. Where there has been non-compliance, the order has become liable to set aside and such non-compliance cannot be corrected by subsequent compliance. Such a strict approach is necessary to guarantee that *Anton Piller* Orders are carried out strictly according to its terms and no further. For this reason the order was subsequently set aside upon application of the respondent, and cannot be the basis of an application for leave to commence committal proceedings against the respondent.

[35] I also refer to *Universal Thermosensors Ltd v. Hibben and Others* [1992] 3 All ER 257 which was brought to my attention by counsel for the applicant where the court held:

> (1) *Anton Piller* orders normally contain a term that before complying with the order the defendant may obtain legal advice, provided this is done forthwith. This is an important safeguard for defendants, not least because *Anton Piller* orders tend to be long and complicated, and many defendants cannot be expected to understand much of what they are told by the solicitor serving the order. But such a term, if it is to be of use, requires that in general *Anton Piller* orders should be permitted to be executed only on working days in office hours, when a solicitor can be expected to be available. In the present case Mrs. Hibben was alone in her house, with her children in bed. She was brought to the door in her night attire at 7.15am, and told by a stranger knocking on the door that he had a court order requiring her to permit him to enter, that she could take legal advice forthwith, but otherwise she was not permitted to speak to anyone else at all. But how could she get legal advice at that time in the morning? She rang her solicitor's office but, predictably, there was no response.
>
> (2) There is a further feature of the situation to which I have just alluded which must never be allowed to occur again. If the order is to be executed at a private house, and it is at all likely that a woman may be in the house alone, the solicitor serving the order must be, or must be accompanied by, a woman. A woman should not be subjected to the alarm of being confronted without warning by a solitary strange man, with no recognisable means of identification, waving some unfamiliar papers and claiming an entitlement to enter her house and, what is more, telling her she is not allowed to get in touch with anyone (except a lawyer) about what is happening.
>
> (3) In the present case a dispute arose about which documents were taken away, and from which of the premises visited. Understandably, those who execute these orders are concerned to search and seize and then get away as quickly as possible so as to minimise the risk of confrontation and physical violence. Nevertheless, in general *Anton Piller* orders should expressly provide that, unless this is seriously impracticable, a detailed list of the items being removed should be prepared at the premises before they are removed, and that the defendant should be given an opportunity to check this list at the time.

(4) *Anton Piller* orders frequently contain an injunction restraining those on whom they are served from informing others of the existence of the order for a limited period. This is to prevent one defendant from alerting others to what is happening. There is an exception for communication with a lawyer for the purpose of seeking legal advice. In the present case that injunction was expressed to last for a whole week. That is far too long. I suspect something went awry with the drafting of the order in this case.

(5) In the present case there was no officer or employee of T.P.L. or Emco present when their offices and workshops were searched and documents and components taken away. This is intolerable. Orders should provide that, unless there is good reason for doing otherwise, the order should not be executed at business premises save in the presence of a responsible officer or representative of the company or trader in question.

(6) The making of an *Anton Piller* order in this case can be seen to be justified by what was discovered. But it is important not to lose sight of the fact that one thing which happened was that Mr. James carried out a thorough search of all the documents of a competitor company. This is most unsatisfactory. When *Anton Piller* orders are made in this type of case consideration should be given to devising some means, appropriate to the facts of the case, by which this situation can be avoided.

(7) *Anton Piller* orders invariably provide for service to be effected by a solicitor. The court relies heavily on the solicitor, as an officer of the court, to see that the order is properly executed. Unhappily, the history in the present case, and what has happened in other cases, show that this safeguard is inadequate. The solicitor may be young and have little or no experience of *Anton Piller* orders. Frequently he is the solicitor acting for the plaintiff in the action, and however diligent and fair minded he may be, he is not the right person to be given a task which to some extent involves protecting the interests of the defendant. I think there is force in some of the criticisms set out in the invaluable article by Professor Dockray and Mr. Hugh Laddie QC on "*Piller Problems*" (1990) 106 LQR 601. It seems to me that the way ahead here, pursuing one of the suggestions made in that article, is that when making *Anton Piller* orders judges should give serious consideration to the desirability of providing, by suitable undertakings and otherwise, (a) that the order should be served, and its execution should be supervised, by a solicitor other than a member of the firm of solicitors acting for the plaintiff in the action; (b) that he or she should be an experienced solicitor having some familiarity with the workings of *Anton Piller* orders, and with judicial observations on this subject (eg, as summarised in the notes in The Supreme Court Practice 1991 to R.S.C., Ord. 29, r. 3); (c) that the solicitor should prepare a written report on what occurred when the order was executed; (d) that a copy of the report should be served on the defendants; and (e) that in any event and within the next few days the plaintiff must return to the court and present that report at an *inter partes* hearing, preferably to the judge who made the order. As to (b), I can see advantages in the plaintiff being required to include in his evidence, put to the judge in support of his application for an *Anton Piller* order, details of the name of the solicitor and of his experience.

[36] From the above cases, this court has, after being appraised by the applicant's solicitors of the same, now concluded and also observed from the facts before me that:

(i) the *Anton Piller* order was not only seeking for the company's documents but also that of the applicant and its related companies and to allow inspection and taking of copies of the same;

(ii) the *Anton Piller* order was not served by the supervising solicitors but by the company's solicitors who were also not named and/or identified in the *Anton Piller* order;

(iii) there was nothing mentioned of the expertise/experience of the supervising solicitors in the affidavit in support in either PW68 or PW128;

(iv) the report prepared by the supervising solicitors were not served on the applicant;

(v) there was no undertaking from the supervising solicitors not to use the documents sought for the purposes of a different suit;

(vi) there is no term in the *Anton Piller* order which states that the applicant was entitled to obtain legal advice before complying with the terms of the said *Anton Piller* order;

(vii) the *Anton Piller* order was not specific as to the evidence that it sought to be protected;

(viii) the terms of the *Anton Piller* order appear to be vague and too wide when the same had seek for *inter alia* various documents mentioned but were not sufficiently clear that the company had sought for documents in relation to or with regards the monetary transactions of the applicant, the company and Ageson Land Sdn Bhd;

(ix) the names of the search party do not appear in the *Anton Piller* order; and

(x) there were other persons appearing at the premises which had not appeared in the *Anton Piller* order, such as one Mr Lim Tien Loong.

[37] The above amongst others, have led me to conclude that the *Anton Piller* order was in the circumstances too broadly framed, imprecise and oppressive. I further hold that the *Anton Piller* order was not carried out strictly on its terms and the undertakings thereunder, where such strict approach is absolutely necessary in such circumstances.

[38] Based on the safeguards and undertakings required for an *Anton Piller* order and the draconian effect of an *Anton Piller* order as set out above in *Arthur Anderson & Co* (*supra*) and *Universal Thermosensors Ltd* (*supra*) as well as

this court's findings above, I hold that as there has been non-compliance of the *Anton Piller* order, such non-compliance cannot be corrected by subsequent compliance.

PW128

[39] As to whether this court strikes out PW68; I agree with Wong Khian Kheong JC (as he then was) in *Sigma Glove Industries Sdn Bhd & Ors v. Ong Chin Kok & Anor* [2018] 3 CLJ 405; [2018] 8 MLJ 481 where His Lordship applying the case of *Pentamaster Instrumentation Sdn Bhd v. QAV Technologies Sdn Bhd & Ors* [2017] 5 CLJ 736; [2017] 11 MLJ 233, held that this court is still duty-bound to consider afresh the *inter partes* application in PW128.

[40] I have thus viewed PW68 and PW128 in its entirety and find that the prayers in PW68 and PW128 are *inter alia* as follows:

> The Respondent Company firstly submits and makes reference to the prayers of both Suit 68 and Suit 128. The relevant prayers for Suit 68 and Suit 128 are reproduced below for ease of reference:
>
> Suit 68
>
> (a) Enter the said Premise and search, check, inspect, make copies and/or seize any of the Applicant Company's documents, accounting ledgers, invoices, price quotation, emails, letters, orders, acknowledgment of receipt, receipts, list of customers and/or any other form of record of record of the Applicant Company which had been stored at the said Premise (referred collectively as "the said Records").
>
> Suit 128
>
> (a) to enter the said Premise and search, check, inspect, make copies and/or seize any of the Applicant Company's documents, accounting ledgers, invoices, price quotation, emails, letters, orders, acknowledgement of receipt, receipts, list of customers and/or any other form of record of the Applicant Company, the First Respondent Company and the Second Respondent Company which had been stored at the said Premise (referred collectively as "the said Records").

[41] Consequently, after reading PW68 and PW128, I find that the factual matrix in both the matters as provided therein are similar and that the prayers or reliefs sought for are also similar. Accordingly, based on part of my findings in respect of PW68 as mentioned above, I therefore find that PW128 amounts to a fishing expedition and an abuse of court process.

[42] I further hold that PW128 is also unsustainable in the absence of the substantive relief which ought to be sought for against the respondents therein ie, the applicant and Ageson Land Sdn Bhd. With respect, the alleged various contradictions made by the applicant and Ageson Land Sdn Bhd in PW128 as contended by the company does not depart from the fact that there has

been numerous non-compliance which has been committed by the company and/or its solicitors in both the PW68 where the *ex parte Anton Piller* order was obtained or in the *inter partes* application in PW128.

Damages

[43] In submitting that the *Anton Piller* order ought not to be granted and damages ought to be given to the applicant, the applicant's counsel had referred this court to *RIH Services (M) Sdn Bhd* (*supra*) where the Court of Appeal held:

> However, if the defendant wants to set aside the *ex parte* order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside or not, if it has not lapsed. If, in the meantime, the *ex parte* order has lapsed, the court should nevertheless hear the application, not for the purpose of setting it aside or not, because it has lapsed, but for the purpose of determining whether that *ex parte* order should or should not have been made in the first place. This is necessary in order to determine whether damages should be awarded or not.

[44] I will address this further in my decision hereinafter.

Decision

[45] In conclusion based on my findings above I hold that the conduct of the company in executing the *Anton Piller* order after the 21 days period is illegal and an abuse of court process and that the company had thus utilised a court order which has expired for the purpose of executing an injunction.

[46] Since this court had held that the *Anton Piller* order has lapsed, the motion is hereby only partly allowed and this court grants order in terms of prayer 2, prayer 3, costs to be borne by the company in the sum of RM15,000 and prayer 5 exemplary damages which is to be assessed and determined at a different date.